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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. HORACIO ALBERTO CASTANOS, Appellant.	)	2 CA-CR 2010-0225 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094235

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
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K E L L Y, Judge.

¶1 Appellant Horatio Castanos appeals his conviction and sentence for possession of drug paraphernalia. Castanos argues the trial court erred in denying his motion to suppress evidence seized during the search of his person because the search

violated his rights under the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution. Finding no error, we affirm.

Background

¶2 In reviewing a trial court's decision on a motion to suppress, we consider only "the evidence presented at the suppression hearing," *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995), and review the facts in the light most favorable to sustaining the ruling, *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). Castanos was a passenger in a pick-up truck stopped by Tucson Police Officer Daryl Williamson for a taillight violation. After Williamson ran a records check, he discovered the driver of the truck "had two outstanding warrants, as well as a suspended driver's license."

¶3 Because A.R.S. § 28-3511 requires police to impound a vehicle for thirty days if the driver is operating the vehicle on a suspended license, Officer Christopher Dennison, who had arrived to assist Williamson, asked both the driver and Castanos to get out of the vehicle. Dennison directed them to stand behind the vehicle, near the patrol car and "ask[ed] them if [he] could search their person." Both men consented, and Castanos informed Dennison he had a pocket-knife. When Dennison searched Castanos, he "located baggies in his front right pocket" that "contained what appeared to be a white residue consistent with cocaine." During an inventory search of the truck, Officer Robert Hearne observed "a red vial . . . [containing] a couple of baggies of . . . cocaine" tucked into the passenger seat, where Castanos had been sitting.

¶4 Castanos was charged with two counts of possession of a narcotic drug and one count of possession of drug paraphernalia. A jury found him guilty of possession of drug paraphernalia, but acquitted him on the two drug possession charges. The trial court sentenced Castanos to a 2.5-year term of incarceration. This appeal followed.

Discussion

¶5 Castanos argues the search of his person violated his rights under the Fourth Amendment and article II, § 8 of the Arizona Constitution, and therefore evidence obtained in the search "should have been suppressed." Specifically, he claims the search exceeded the permissible scope of a traffic stop and therefore his consent was obtained during an unlawful detention. "When reviewing a trial court's ruling on a motion to suppress, 'we evaluate discretionary issues for an abuse of discretion but review legal and constitutional issues de novo.'" *State v. Ahumada*, 225 Ariz. 544, ¶ 5, 241 P.3d 908, 910 (App. 2010), *quoting State v. Huerta*, 223 Ariz. 424, ¶ 4, 224 P.3d 240, 242 (App. 2010).

I. Fourth Amendment to the United States Constitution

¶6 The search of a person "without a warrant supported by probable cause" is generally considered an unreasonable search that violates the United States Constitution. *See Ahumada*, 225 Ariz. 544, ¶ 6, 241 P.3d at 910. But valid consent is a well established exception to the warrant requirement. *State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004), and "[a] search to which an individual consents meets Fourth Amendment requirements." *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967).

¶7 Castanos argues his consent was invalid because he gave it while illegally detained. Castanos maintains the traffic stop "was complete" before he gave consent, and

"there was no longer any legal justification to keep [him], the passenger, at the scene." "[E]vidence obtained based on voluntary consent must still be suppressed" if the consent is tainted by earlier unlawful conduct by the police. *Davolt*, 207 Ariz. 191, ¶¶ 28-29, 84 P.3d at 467-68. But we see nothing unlawful in the police conduct here.

¶8 Castanos does not argue the truck was unlawfully stopped, or that it should not have been impounded. See A.R.S. § 28-3511. Indeed, he essentially concedes that police were justified in removing him from the truck. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997) ("an officer making a traffic stop may order passengers to get out of the car pending completion of the stop"). But, he argues his "continued detention" after "the determination that the driver was to be arrested and the truck impounded" exceeded the permissible scope of the stop.

¶9 We disagree with Castanos's contention that the traffic stop was complete before he gave consent. Passengers are seized within the meaning of the Fourth Amendment when the vehicle in which they are riding is pulled over. *Brendlin v. California*, 551 U.S. 249, 263 (2007). When a passenger is detained as part of a traffic stop the "seizure . . . continues, and remains reasonable, for the duration of the stop. Normally, [a] stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Arizona v. Johnson*, 555 U.S. 323, ___, 129 S. Ct. 781, 788 (2009) (*Johnson I*). Here, the officers had to remove Castanos from the truck in order to conduct the required inventory search before the truck was impounded and towed. One purpose of the inventory search before towing is to permit the vehicle's occupants to retrieve valuable items. And the officers had a

continuing need to maintain control of the scene while they inventoried the vehicle. *See id*. at ___, 129 S. Ct. at 786 ("traffic stops are 'especially fraught with danger to police officers'"), *quoting Michigan v. Long*, 463 U.S. 1032, 1047 (1983). Further, "inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id*. at ___, 129 S. Ct. at 788.

¶10 Castanos argues that because his presence was unnecessary for the inventory search, the officers should have allowed him to leave, and therefore, by asking for consent to search his person, police exceeded the duration reasonably necessary "to complete the purpose of the stop." *See Brendlin*, 551 U.S. at 258. But even if he is correct that he did not need to be present during the inventory search, police are "not constitutionally required to give [a passenger] an opportunity to depart the scene after . . . exit[ing] the vehicle without first ensuring that . . . [they are] not permitting a dangerous person to get behind [them]." *Johnson I*, 555 U.S. at ___, 129 S. Ct. at 788. Dennison's request for consent to search Castanos was an appropriate measure to ensure the officers' safety, and did not "measurably extend the duration of the stop."[1] *Id.* Because Castanos

[1]Even if the officer had not obtained Castanos's consent, he was constitutionally permitted to "frisk a passenger of a lawfully stopped vehicle for weapons if the officer has reason to believe the person is armed and dangerous." *State v. Johnson*, 220 Ariz. 551, ¶ 6, 207 P.3d 804, 808 (App. 2009) (*Johnson II*). Castanos's attorney maintained in the trial court that even if such a frisk had been permissible, officers would not have discovered the baggies in question. We need not consider what would have been discovered in a weapons search, because the search here was based on Castanos's consent. *See United States v. Fuentes*, 105 F.3d 487, 489 (9th Cir. 1997) ("Reaching into [suspect's] pocket did not have to be justified . . . because [he] consented to it.").

was lawfully detained when he consented to the search of his person, *see id.*, we need not consider his arguments that his detention was not sufficiently attenuated from his consent to render it valid. *Cf. Davolt*, 207 Ariz. 191, ¶¶ 30-33, 84 P.3d at 468 (considering attenuation where consent based on information obtained during improper custodial interrogation).

¶11 Castanos also argues for the first time on appeal that his consent was not voluntary. He is correct that "[t]o be valid, consent must be voluntary." *Id.* ¶ 29. The state asserts that this argument is both forfeited for Castanos's failure to raise it below and waived under *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008), for failure to properly argue it on appeal. Castanos counters that because he cited *State v. Davolt* in the trial court, it "was aware that the question of consent was in issue." Although *Davolt* discusses the voluntariness of consent, 207 Ariz. 191, ¶ 29, 84 P.3d at 468, Castanos did not cite the case for this proposition. In fact, he argued that *Davolt* demanded suppression of the evidence, even if his consent was "voluntary." *See id.* Because Castanos never argued to the trial court that his consent was involuntary, he is limited to fundamental error review. *See State v. Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d 833, 842 (2006) (suppression argument "raised for the first time on appeal" reviewed for fundamental error).

¶12 On appeal, Castanos does not argue the trial court's implicit finding that his consent was voluntary constituted fundamental prejudicial error, and therefore we do not consider the issue. *See Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d at 140 (failure to argue fundamental error when standard applies constitutes waiver). We

conclude the trial court did not err in denying Castanos's motion to suppress evidence due to a Fourth Amendment violation.

II. Article II, § 8 of the Arizona Constitution

¶13 Castanos also asserts that even if the search did not violate the Fourth Amendment we "should nonetheless determine that it contravenes the Arizona Constitution," which provides "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8. Castanos acknowledges that "Arizona courts have not yet held that Article II, section 8 provides greater protection than the Fourth Amendment against searches and seizures outside the home-search context." But he contends "Arizona[']s Constitution] has an explicit right to privacy that has been held to provide broader protection against governmental intrusion than the federal constitution in some contexts." Castanos argues we should follow the courts of several other states which "recognize[] that passengers are entitled to be free from unnecessary intrusions during traffic stops." He further argues "[e]ven if Arizona law . . . permit[s] detention of passengers for the duration of a traffic stop, . . . [it] does not permit an interrogation of passengers about matters unrelated to the stop[] . . . unless supported by reasonable suspicion of criminal activity."

¶14 Castanos did not make this argument to the trial court. Rather, he argued broadly that the search of his person violated both the Fourth Amendment and article II, § 8 of the Arizona Constitution. He made no separate argument that the Arizona Constitution provides more extensive privacy protection than the federal constitution. In fact, in his motion to suppress, he argued he had "been [unlawfully] seized within the

meaning of the Fourth Amendment," without further reference to the Arizona Constitution.

¶15 We may consider constitutional arguments raised for the first time on appeal. *See State v. Gilfillan*, 196 Ariz. 396, n.4, 998 P.2d 1069, 1074 n.4 (App. 2000). However, we previously have considered and rejected the arguments Castanos raises. *State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009) ("Arizona's right to privacy outside the context of home searches [is no] broader in scope than the corresponding right to privacy in the United States Constitution") (*Johnson II*). And we reiterated that "our jurisprudence has consistently found our constitutional protections to parallel those provided by the Fourth Amendment." *Id.* We see no reason to deviate from that decision. *See State v. Benenati*, 203 Ariz. 235, ¶ 7, 52 P.3d 804, 806 (App. 2002).

Disposition

¶16 Castanos's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge